Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-245

DAY & ZIMMERMANN, INC.,

Petitioner,

versus

HAWLEY K. CHALLONER, DAVID E. NELMS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DANIEL E. NELMS, AND MARY EDNA NELMS,

Respondents.

RESPONSE OF DAY & ZIMMERMANN, INC. PETITIONER, TO BRIEF OF RESPONDENTS OFFERED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO RESPONDENTS' BRIEF ON THE CONFLICT OF LAWS QUESTION

Respondents' brief (page 1) challenges the correctness of Petitioner's assertion that "There was no sale by Petitioner to the United States of any product, and it never had any right of ownership in the ammunition."

In its challenge of this statement, Respondents (page 2) assert that Day & Zimmermann, Inc. ". . . did sell the completed product to the United States Government." They say that such is a judicial fact by reason of *Day & Zimmermann, Inc. vs. Calvert*, 519 S.W.2d 106, Tex. Sup.Ct. 1975. This case is not authority for such position.

This litigation (now pending before the Supreme Court of the United States on Petition for Certiorari by "Bob Bullock, Comptroller of Public Accounts of the State of Texas") involved an assessment for sums allegedly due under the Texas Limited Sales, Excise and Use Tax Act. The stipulation of facts (No. 34 and 67) state that no tax was assessed upon component parts going into the finished ammunition product and that (No. 67) no tax was involved on ammunition and/or components produced by Day & Zimmermann, Inc. and delivered to the United States Government. The items subject to litigation in the tax controversy are described by the State of Texas in its Petition to this Court as follows:

> "The taxes were not levied on any of the component parts that went into the assembled ammunition and munitions received by the United States, but were imposed only on taxable supplies such as computer time and other equipment leased by Day and Zimmermann, stationery, toilet paper, pencils, other secretarial supplies, ice, light bulbs and charges for the printing and supplying of the plant newspaper for Day and Zimmermann employees."[1]

1 See pages 3-4 of Petition for Writ of Certiorari to the Supreme Court of Texas as filed by the State of Texas pending in the Supreme Court of the United States.

The Texas Supreme Court (p. 108) says the audit involved tangible personal property ". . . not including any of the component parts that went into the finished product, purchased and consumed by the operating contractor in its performance with the Federal Government."

Hence the case cited has not reduced to a judicial certainty the fact that the finished ammunition products were "sold" to the Government. Day and Zimmermann's assertion in its Petition that there was no sale was, and is, a correct statement.

Respondents (beginning p. 2 of Brief) say there has been an evolution in the past on choice of law rules and hence the Texas Supreme Court *could*, and in light of cited cases, "probably would, refuse to follow the lex loci delecti rule in a case like the present one, ..." Respondents' brief (p. 6) says the Court of Appeals adopted the correct choice of law rule and ". . . the one the Texas Supreme Court probably would have adopted, ..." This is but prophecy on the part of counsel as to what the Texas Supreme Court would do. It is not uncommon for the federal courts to predict the holding of a state court where that latter court has made no pronouncement. However this approach was used in the Fifth Circuit[2] wherein the parties there were attempting to get the Fifth Circuit to say that the Texas Supreme Court would, at the time of *Doss*, have changed its decision had it been confronted with the factual situation presented in *Marmon vs. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968). The Fifth Circuit says that such an approach ". . . ignores the prin-

2 *Doss vs. Apache Powder*, 430 F.2d 1317, 1321.

cipal of stare decisis, disregards the fact that many jurisdictions have chosen to retain the traditional rules when litigants urged that such rules be discarded and asked the federal courts to second guess the highest court of a state as to matters of state law." The Court of Appeals (Fifth Circuit) in *Doss* observed "In this diversity action, we are bound to apply the law of Texas, including its conflict of law rules. *Klaxon vs. Stentor*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)."

The Fifth Circuit in *Doss* not only refused to follow the approach suggested in *Challoner*, but it adhered to the rule of stare decisis and did not there depart from the Texas law. The Court of Appeals in *Challoner* was not so bound as it was in *Doss* as it was willing to follow Texas law on strict liability but did depart on conflicts and apply its own rule.

Respondents assert (p. 8 of Brief) that Petitioner, Day & Zimmermann, Inc. is acting inconsistently and in bad faith by contending that Cambodian law should apply. This contention is because of a stipulation by Day & Zimmermann, Inc. in the trial of a cause (*Burns vs. Day & Zimmermann, Inc.*) pending in the Southern District of New York wherein it was stipulated that the Texas law was applicable. As evidence of such stipulation, Respondents' attach as Appendix B a part from the record of that cause. No inconsistency exists in the position in the New York case and the Texas case now before this Court. The New York case was a bifurcated trial and the stipulation came about in the trial on the damages issues — not the liability question. Further, New York follows the "most significant

contacts" theory of conflicts[3] and not the Texas lex loci delicti theory. Hence, to seek application of Vietnamese law in the New York trial would have been inappropriate as Vietnamese law would have application.

Petitioner's principal support in its response to Day & Zimmermann's Petition to apply Texas law is founded upon *Couch vs. Mobil Oil Company*, 327 F.Supp. 897, Southern District of Texas, 1971. There the District Court did follow the interest analysis rule. This case has never been cited as authority by any subsequent case. The Court for the Northern District of Texas subsequent to *Couch* in *Mark Smith vs. General Motors Corporation*, 382 F.Supp. 766, when dealing with a claim arising in the Republic of Mexico, and after pointing out that the wrongful death statute of Texas had no extraterritorial application, then followed the Texas Supreme Court rule of *Marmon vs. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968). The District Court in *Smith vs. General Motors* followed the Fifth Circuit's holding in *Doss*, but the Fifth Circuit in *Challoner* was unwilling to follow its precedent fixed in the *Doss* case. *Challoner vs. Day & Zimmermann* points up the inconsistency of the Fifth Circuit in its failure to follow the basic rules of *Erie* and *Klaxon* and also in failing to adhere to its earlier pronouncements in *Doss*. Nothing can be said for the District Court's holding in *Couch* except that it reflects that Court's findings on conflicts and shows that it is wholly inconsistent with pronouncements of the Supreme Court of the United States and of the Supreme Court of Texas and other District Courts of Texas.

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3 *Babcock vs. Johnson*, 12 N.Y.2d 473, 119 N.E.2d 279, 240 N.Y.2d 743 (1963).

CONCLUSION

Petitioner prays that its application for certiorari be granted.

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ATTORNEYS FOR
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Response of Day & Zimmermann, Inc., Petitioner, to Brief of Respondents offered in opposition to Petition for Writ of Certiorari has been mailed to Mr. Cahill Hitt, Hitt, Pesek & Lovett, P. O. Box 18, Texarkana, Texas 75501, Attorney for Respondents, on this the ____ day of October, 1975.

Norman C. Russell